(12) (9)

Case No. 01-1118, 01-1119

Supreme Court, U.S.
FILED

JUL 2 2002

OFFICE OF THE CLERK

In The

Supreme Court Of The United States

OCTOBER TERM 2001

JOSEPH SCHEIDLER, et al

AND

OPERATION RESCUE,

Petitioners,

VS.

NATIONAL ORGANIZATION FOR WOMEN, INC, et al,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF CATHOLICS FOR LIFE, SACRAMENTO, AS *AMICUS CURIÆ* IN SUPPORT OF PETITIONERS AND APPENDIX

JAMES JOSEPH LYNCH, JR.
Attorney at Law (Cal. SBN 85805)
2740 Howe Ave.
Sacramento, CA 95812-0336
(916) 921-1988
jjlynch@cwnet.com

Counsel for *Amicus Curiæ*

26 pp

Table of Authorities ii

INTEREST OF *AMICUS CURIÆ* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. *STARE DECISIS* IS LESS BINDING ON THIS COURT ON CONSTITUTIONAL ISSUES EVEN IN THE FACE OF LONG STANDING AND WIDESPREAD PRACTICE 3

II. THE CONCEIVED UNBORN ARE PERSONS IN THE CONSTITUTIONAL SENSE BY VIRTUE OF "POSTERITY" IN THE PREAMBLE OF THE CONSTITUTION 4

A. THE CONSTITUTIONAL AND LEGAL FRAMEWORK 4

B. A CONCEIVED UNBORN IS LIFE WITHIN THE MEANING OF THE 5TH AMENDMENT 9

C. THE CONCEIVED UNBORN ARE ENTITLED TO PROTECTION 10

III. PETITIONERS HAVE A RIGHT TO USE REASONABLE FORCE TO PROTECT HUMAN LIFE; THE RECORD DOES NOT SUPPORT A CLAIM OF UNREASONABLE FORCE BY PETITIONERS 11

A. THE RIGHT TO DEFEND OTHERS, GENERALLY 11

B. FIRST AMENDMENT RIGHT TO SPEECH 11

C. THE RICO CLAIM 12

D. THE HOBBS ACT. 12

CONCLUSION 13

Table of Authorities

CASES

Alamo School Dirt. v. *Jones,* 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960) 7, 8

Anderson v. United Realty Co., 79 Ohio St. 23, 86 N.E. 644, aff'd 222 U.S. 16 (1911) 9

Barber v. Pittsburgh, F. W. & C.RL Co., 166 U.S. 83 (1897) 9

Bolling v. Sharpe, 347 U.S. 497 (1954) 4

Bowers v. Hardwick, 478 U.S. 186 (1986) 13

Bray v. Alexandria, 113 S.Ct. 753 (1993) 1

Brown v. Board of Ed., 349 U.S. 294, 298 (1955) (*Brown III*) 4

Brown v. Bd. of Education, 347 U.S. 483 (1954) (*Brown II*) 4

Brown v. United States, 256 U.S. 335 (1921) 13

Chicago B. & *Q.* R.R. Co. v. Iowa, 94 U.S. 155 (1877) 6

Coggs v. Berherd, 2 Ed.Raym. 909 (1703) 9

Cruikshank, supra, 92 U.S. (2 Otto), at 549 12

Ex Parte Garland, 4 Wall. 333 (1867) 4

Field v. Clark, 143 U.S. 649, 691 (1891) 3

Flash v. Cohen, 392 U.S. 83 (1968) 12

Gannon v. Albright, 183 Mo. 238, 81 S.W. 1162 (1904) 8

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 6

Haward v. Howe, 12 Gray (Mass.) 49 *(1858)* 8

Hertz v. Abrahams, 110 Ga. 707, 36 S.E. 409 (1900) 8

Hodgson v. Minnesota, 497 U.S. 417 (1990) 1

Katz v. United States, 389 U.S. 347 (1967) 12

Kay v. Scates, 37 Pa 31(1860) 8

Land v. Dollar, 330 U.S. 731 (1947) 6

Larew v. Larew, 146 Va. 134, 135 S.E. 819 (1926) 8

McIntosh v. Dill, supra, 205 P. 917 (1922) 8, 11, 12

Mullane v. Central Hanover B&T, 339 U.S. 706 (1950) 12

Planned Parenthood v. Williams, (1994) 7 Cal.4th 860 1

Plessy v. Ferguson, 163 U.S. 537 (1896) 4

Roe v. Wade, 410 U.S. 113 (1973) 2, 3, 4, 15

Scott v. Sanford, 60 U.S. (19 How.) 404 (1857) 5, 6

Sink/er v. Kneale, 401 Pa 267, 164 A.2d 93, 94 (1960) 8

Turnock v. Ragsdale, 503 U.S. 916 (1992) 1

United States v. Cruikshank, 92 U.S. (2 Otto) 542 ..... 5, 6

United States v. Cruikshank, 92 U.S. (2 Otto) 542, 550 (1876) 6

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 1

White v. Hart, 80 U.S. (13 Wall.) 646, 650 (1872) 8

Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) 14

Witters v. Washington Dept of Social Svcs for the Blind, 474 U.S. 481 (1986) 7

CONSTITUTIONS

United States

Preamble 5

Art. 01, Sec. 8, cl. 17 8

Art. 04, Sec. 2, cl. I 8

Art. 04, Sec. 3, cl. 2 8

Art. 06 6

Art. 06, cl 2 12

1st Amendment 14

3rd Amendment 9. 12

4rd Amendment 9

5th Amendment 4, 6, 9, 12

13th Amendment 5

14th Amendment 4, 5, 6

CODES

United States

18 U.S.C., § 1951) 15

MISCELLANEOUS

2 Farrand, Max, The Constitutional Debates 9

2 Stephens Commentaries 342 (1841) 11, 12

3 Blackstone's Commentaries 3 13

3 Rotunda, op cit., p. 663, note I 9

17 Halsbury's Laws of England (1st ed, 1911) Infants §§ 132, 135 11

17 Halsbury's Laws of England, Infants §§ 132, 135 (1st ed, 1911) 12

21 Exodus 22 7

28 AMERICAN JURISPRUDENCE, Second, Estates, § 53 9

3 Rotunda, Treatise on Constitutional Law § 23.33, p.

512 (1986) 3

31 *Corpus Juris Secundum,* Estates § 4 8

75 Landmark Briefs and Arguments of the Supreme Court of the United State 4

Aquinas, *Summa Theologiæ,* 1, q. 76, a. *5* and q. 118 7

Aristotle, *Politics,* VII, *1335b,* 24-26 7

Biology: Observation & Concept by Case & Steirs (1971) 10

Biology: Observation & Concept by Case & Steirs (1971), p. 110. 10

Biology: Observation & Concept by Case & Steirs (1971). 11

Bishop, Criminal Law § 877 (9th Ed., 1923) 13

Blackstone at Book IV, p. 198 7

Boyce & Perkins, Criminal Law and Procedure 819-20 (West, 7th ed 1989) 13

Chitty on Contracts (23rd Ed, 1968) 134 9

Foster, Crown Law 273-277 (1762) 13

Gray, The Rule Against Perpetuities (4th Ed.) 7, 8

Halsbury's Laws of England (1st Ed, 1911) Infants §*132, 135 8

Hobbes, Leviathan (1651) 9

I Kings 1-2 5

I Sam. 16 5

II Sam. 5, 9-20 5

International Convention on the Prevention and Punishment of the Crime of Genocide, Congressional Digest, December 1984 12

Jacobs, Warren M. and Jacobs Mark A., MDs, Obstetrics and Gynecology, Family Health & Medical Guide (1979) 11

Laqueur, THE-HUMAN RIGHTS READER (1979)..... 9

Locke, SECOND TREATISE OF GOVERNMENT (1690)..... 9

Lynch, "*Posterity: A Constitutional Peg for the Unborn*," 40 AJJ 401 (Notre Dame Law School. 1995)..... 2

Magna Carta (1215), Art. *54*..... 7

McKechnie, Magna Carta, Art. 41..... 6

Milton, John, AREOPAGITICA (1644)..... 7

Noonan, CONTRACEPTION, 86-88 (Harv. U. Press, 1965)..... 7

Restatement (2nd) Torts §§ 63, 64, & 65..... 13

Restatement, Contracts (1st) §77..... 9

Salmond, Torts 375 (11th Ed 1953.)..... 13

Schwartz, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY..... 8

Verdross, *Forbidden Treaties In International Law*, 31 AJIL 571 (1937..... 9

Verdross, *Jus Dispositivum & Jus Cogens In International Law*, 60 AJIL 55 (1966)..... 9

BRIEF OF BRIEF OF CATHOLICS FOR LIFE, SACRAMENTO, AS *AMICUS CURIÆ* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIÆ*

Catholics for Life, Sacramento,[1] is a non-profit association formed to support women pregnancy crisis, and does support such women with birthing centers, counseling, pregnancy education, childcare, and related issues. The Association also carries on an active education campaign on pregnancy and abortion, for schools, groups and other interested persons by providing literature, public speakers, and other resources. The Association does carry on public demonstrations in a peaceful manner by praying the Rosary, and displaying placards and banners. The Association advocates non-violent resistance to abortion. Counsel for the Association is admitted the highest court of the State of California, and a member of the Bar of this Court. He has taken an oath to uphold and defend the Constitution of the United States and to defend the poor, down trodden, and oppressed. He also presented a similar *Amicus Curiæ* Briefs in this court, and is published on the subject matter.[2] He is a former professor of Law, University of Northern California, Lorenzo Patiño School of Law. He has written articles on the subject matter at hand and copyrighted one article on Abortion en-

---

[1] *Amicus curiae* CFL files this brief in accordance with the order of this court dated 5/8 & 5/9/02, by 7/2/02. Counsel for CFL authored this brief in its entirety. No person or entity, other than the CFL, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief. CFL also acts as an advisory panel to the Bishop of Sacramento, but neither speaks for the Bishop nor the Catholic Church and neither contributed to the brief.

[2] James Joseph Lynch is the author of *Abortion and Inalienable Rights in American Jurisprudence: A Prospective Policy* (1987), and has filed *amicus curiae* briefs in: *Webster v. Reproductive Health Services, 492 U.S. 490 (1989);* Ohio v. Akron Reproductive Ctr., 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Bray v. Alexandria*, 113 S.Ct. 753 (1993); *Planned Parenthood v. Williams*, (Calif., No. 5031721, 1994). The views expressed herein are the author's. In *Turnock v. Ragsdale*, 503 U.S. 916 (1992), counsel provided a draft brief for the Attorney General of Illinois which ultimately led to the ACLU's dismissal of the case.

titled.[3]

This case touches and concerns the continuing validity of *Roe v. Wade*, and its progeny, and, as such, a decision herein will affect not only the Laws in the State of Illinois, but all of its sister States and territories of the United States. This court's *Amicus* is concerned about the rights of that class of persons recognized in the Preamble of the Constitution denominated "posterity", and its subclass "conceived unborn" and is concerned, and has been concerned for some time, that the conceived unborn, have been unrepresented or under-represented in any court in the years of litigation which has followed since *Roe v. Wade* was decided in this court in 1973. *Amicus* was convinced then, and remains convinced, that the court was misled as to the meaning of personhood. It is amicus' belief that a conceived unborn is a member of Posterity found in the Preamble of the Constitution, and that it is imperative, for the preservation of a basic respect for human life, and the values enshrined in the Constitution of the United States, that the conceived unborn be recognized as a member of Posterity, entitled to protection.

SUMMARY OF ARGUMENT

1. This Court has recognized that unconstitutional conduct which has been widespread and in long use cannot stand, and that with respect to the Constitution, *stare decisis* is of less importance than in other cases, and therefore the holding of *Roe v. Wade* is not necessarily binding on this Court, and in fact should be rejected for reasons set forth hereinafter.

2. The most logical place to look for persons entitled to protection by the Constitution is the Preamble. While the Preamble does not create rights, it does define for whom the rights were created - Ourselves and Our Posterity. This court has recognized aliens and artificial persons as entitled to protection; therefore it is an anomaly not to find that the conceived unborn are also entitled to protection. A construction that Posterity includes the conceived unborn is consistent with the intent of the framers and the common

[3] *Abortion and Inalienable Rights in American Jurisprudence: A Prospective Policy*; Lynch, "*Posterity: A Constitutional Peg for the Unborn*," 40 AJJ 401 (Notre Dame Law School. 1995).

law understanding that a conceived unborn was a person in being, such that a conceived unborn is a person in the Constitutional sense, and because this was not brought to this Court's attention in *Roe v. Wade*, and its progeny, *Roe v. Wade, and its progeny* must be overruled as unsound in principal, unworkable in practice and contrary to the intent of the framers.

3. Because a conceived unborn is a person in the constitutional sense and a petitioners have the common law right to defend the life of a third person about to be taken without justification or excuse, on the record before the court, the court below erred because there is no showing of unreasonable force in light of the willful and wanton taking of human life in the form of a conceived unborn.

Conclusion. Based upon the foregoing, this court should overrule *Roe v. Wade*, 410 U.S. 113 (1973) prospectively, reverse the decision of the Fourth Circuit at 914 F.2d 583 as to the rights of women to have abortions, and remand for further proceedings not inconsistent with this Court's opinion.

ARGUMENT

I.

STARE DECISIS IS LESS BINDING ON THIS COURT ON CONSTITUTIONAL ISSUES EVEN IN THE FACE OF LONG STANDING AND WIDESPREAD PRACTICE

Statutes or practices inconsistent with the Constitution, however numerous, can create neither a power which the Constitution does not bestow nor furnish a construction which the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649, 691 (1891); 3 Rotunda, Treatise on Constitutional Law § 23.33, p. 512 (1986). This court, with characteristic good grace, invalidated its own Rules of Court, in part; based on a Congressional Statute requiring attorney's to take an oath with respect to their activities before the civil war, when it was pointed out that the provision was in fact unconstitutional. *Ex Parte Garland*, 4 Wall. 333 (1867). Faced with the Constitutionality of "separate but equal" facilities, a practice in existence throughout the south for nearly 60 years, and sanctioned by this Court, this Court *overruled*, and rightfully so, *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Bd. of Education*, 347 U.S.

483 (1954) (*Brown II*). *Accord, Bolling v. Sharpe*, 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues which need to be resolved once and for all, this court has not allowed the fact that some issues were not properly addressed in the courts below from ordering further argument on the omitted issues so that the continuing controversy could be settled. *Brown II*, 347 U.S., at 488-89, 496 (1953); *Brown v. Board of Ed.*, 349 U.S. 294, 298 (1955) (*Brown III*) (Nature of remedy).

This court in *Roe v. Wade*, 410 U.S. 113 (1973) , *held* that a state had no right to regulate abortions in the first trimester of pregnancy in view of the right of privacy of the mother, could provide some regulation in the second trimester, and had the right to full regulation in the third trimester. In reaching this result, the court noted that Texas had failed to demonstrate where in the Constitution the conceived unborn was a person in the Constitutional sense. 410 U.S., at 157-59. A reading of the Petition, Response, and Briefs on the merits by the parties and *amicus* in *Roe v. Wade*, shows that the primary focus of argument was on the term 'person' as found in the 5th Amendment and 14th Amendments of the Constitution. 75 Landmark Briefs and Arguments of the Supreme Court of the United States. The opinion itself does not address the Preamble, nor any of the terms found in the preamble.

II.

THE CONCEIVED UNBORN ARE PERSONS IN THE CONSTITUTIONAL SENSE BY VIRTUE OF "POSTERITY" IN THE PREAMBLE OF THE CONSTITUTION

A. The Constitutional and Legal Framework

The most logical place to look for meaning of "personhood" is the Preamble,[4] because, while its purpose is not to create rights,[5] it

---

[4] The first record that a sovereign rules with the consent of the governed appears to be I Sam. 16, II Sam. 5, 9-20, I Kings 1-2. When David's father died, he ruled over the seven tribes of Judah for seven years. Then the elder of Israel met with Davit at Hebron, and they made a contract for David to rule them as well. Thereafter David ruled over all of Israel and Judah for forty years. Other codes, most notably the Cede of Hammurabi were in writing, but were unilateral

does define for whom the rights were created.[6] The Preamble reads:

> "We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to **ourselves** and our **Posterity**,[7] do ordain and establish this Constitution for the United States of America." Appendix, p. A6.

Neither the 5th nor the 14th Amendment defines person. The 14th Amendment defines citizenship.[8] In other contexts, the court has held that aliens[9] and artificial persons[10] are persons entitled to Constitutional protection. Not to recognize unborn and partially born children as a person is therefore an anomaly.

The words "people of the United States" and "citizens" are synonymous terms.[11] The Preamble creates two classes of sover-

---

acknowledgments of human rights. The *Magna Carla,* infra, appears to be the first written document executed by both the sovereign and its subjects. The Constitution abolished traditional sovereignty, placed sovereignty in the People, signed by their representative, and ratified by them according to their respective state procedures.

[5] Scott v. Sanford, 60 U.S. (19 How.) 404 (1857); Cruikshank, supra, 92 U.S (2 Otto), 542, 549. The 13th & 14th Amendments do not overrule Scott, but only remove the limitations found, thus enlarging the class of persons who are citizens.

[6] Scott v. Sanford, 60 U.S. (19 How.) 404 (1857); Cruikshank, supra, 92 U.S. (2 Otto), at 549.

[7] This court has used the term "posterity" on one prior occasion, *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 550 (1876), but has never before been called upon to define the term, and to, or for, whom it was intended to include.

[8] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof,..." *E.g.. Hampton v. Mow Sun Wong,* 426 U.S. 88 (1976); U.S. Const., Art. VI, Treaty Clause; McKechnie, Magna Carta, Art. 41 (Aliens).

[9] E.g. Hampton v. Mow sun Wong, 426 U.S. 88 (1976) ; US. Const., art. VI, Treaty Clause; McKechnie, Magna Carta, Art. 41 (aliens).

[10] See Chicago B. & *Q*. R.R. Co. v. Iowa, 94 U.S. 155 (1877); *E.g., Land v. Dollar,* 330 U.S. 731 (1947) *(Replevin;* Stock taken under color of federal law).

[11] Scott v. Sanford, 60 U.S. (19 How.) 404 (1857); Cruikshank, supra, 92

eignty, "ourselves" and "our Posterity.[12] Its purpose appears to be to include "Posterity[13] on an equal footing with, and having the same rights as, "ourselves" as evidenced by the parallel structure of the phrase. Therefore, "Posterity" as to those who are lives in being is synonymous, if not with "citizenship,"[14] surely "personhood." [15] This understanding is consistent with an understanding of the meaning of "Posterity" in 1787.[16]. In 1644, in a well-known pamphlet, it was argued, "Parliament could no more censure the issue of the mind than it could the issue of the womb."[17] At common law, certain members of future generations, unborn and partially born children,[18] were lives in being for the purposes of the Rule Against Perpetuities.[19] Moreover, prenatal injuries were to a limited extent recognized at Common Law,[20] and it does not ap-

---

U.S. (2 Otto), 542, 549

[12] ABORTION AND INALIENABLE RIGHTS, etc, supra, at footnote 1, pp. 11-12.

[13] "Posterity" is capitalized in the original. As a noun is capitalized only if it identified a particular person, place, or thing, it implies the framers considered the word important

[14] See footnote 9, supra. It is probably more accurate to say unborn, partially born, children are persons who becomes a citizen (§ 1, 14th Amendment), except that the right to vote comes at age 18. (26th Amendment)

[15] See footnotes 4 and 12

[16] ABORTION AND INALIENABLE RIGHTS.

[17] Milton, John, AREOPAGITICA (1644).

[18] Aristotle, *Politics,* VII, *1335b,* 24-26; Aquinas, *Summa Theologiæ,* 1, q. 76, a. *5* and q. 118; Noonan, CONTRACEPTION, 86-88 (Harv. U. Press, 1965). The Old Testament provided a remedy against persons causing a miscarriage. 21 Exodus 22. It is not repugnant to the 1st Amendment Establishment Clause merely because civil law corresponds to the tenets of some religions. *E.g., Witters v. Washington Dept of Social Svcs for the Blind,* 474 U.S. 481 (1986).

[19] Gray, The Rule Against Perpetuities (4th Ed.); Alamo School Dirt. v.*Jones,* 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960).

[20] "To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and die by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them." Lord Coke, repeated by Blackstone at Book IV, p. 198. His reasoning may have been influenced by (1) "No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband." *Magna Carta* (1215), Art.

pear that tort actions for the injuries were barred.[21] Had the framers used "and our heirs", it would have created the equivalent of a fee simple absolute with powers of alienation,[22] a concept clearly inconsistent with the concept of "unalienable rights" in the Declaration of Independence[23] and the concept of an "indestructible and perpetual union"[24] in the Preamble, whereas if construed as a fee tail,[25] it would be consistent with an intent to create "unalienable rights" and a "perpetual union,"[26] for the protection of future generations, including the conceived unborn.

---

54. As her unborn child was not her husband, obviously, there was a failure of evidence. (2) medical knowledge as to unborn children was quite primitive when compared to modern medical knowledge.

[21] *Sink/er v. Kneale,* 401 Pa 267, 164 A.2d 93, 94 (1960); *McIntosh v. Dill, supra,* 205 P. 917 (1922); Halsbury's Laws of England (1st Ed, 1911) Infants §*132, 135.

[22] *White v. Hart,* 80 U.S. (13 Wall.) 646, 650 (1872). Other constructions result in a power of alienation inconsistent with unalienability: contingent remainder, Gray, THE RULE AGAINST PERPETUITEES (4th Ed.); *Alamo School District v. Jones,* 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960); the rule in Shelly's Case, 31 *Corpus Juris Secundum,* Estates § 4.

[23] "We hold these truths to be self-evident, that all men are created equal that they are endowed by their Creator with certain unalienable Rights, that Governments are instituted among Men, deriving their just powers from the consent of the governed. American Declaration of Independence, § 2; Schwartz, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY.

[24] *White v. Hart,* 80 U.S. (13 Wall.) 646 (1872) construing the preamble.

[25] *Hertz v. Abrahams,* 110 Ga. 707, 36 S.E. 409 (1900); *Haward v. Howe,* 12 Gray (Mass.) 49 *(1858); Gannon v. Albright,* 183 Mo. 238, 81 S.W. 1162 (1904); *Kay v. Scates,* 37 Pa 31(1860); *Larew v. Larew,* 146 Va. 134, 135 S.E. 819 (1926). The Constitution concerns estates and interests in land. Art. I, Sec. 8, cl. 17 (District of Columbia; Places purchased); Art. III, Sec. 3, cl. 2 (forfeitures); Art. IV, Sec. 2, cl. I (privileges and immunities), Sec. 3, cl. 2 (property of the United States); Amendment III (Quartering of soldiers); Amendment IV (Secure in . . . Houses); Amendment V (nor be deprived of. . . property. . . nor shall private property be taken. ")

[26] 28 AMERICAN JURISPRUDENCE, Second, Estates, § 53. *Cf, Barber v. Pittsburgh, F. W. & C.RL Co.,* 166 U.S. 83 (1897); *Anderson v. United Realty Co.,* 79 Ohio St. 23, 86 N.E. 644, aff'd 222 U.S. 16 (1911), (recognizing by *dictum* common law rule).

The Constitution was submitted to the People for ratification.[27] Implicit in the Preamble is the concept that the Constitution is to be a social contract[28] wherein society promises the individual unalienable rights, in return for which the individual promises to conform to the laws of society, which do not derogate[29] from unalienable rights. Mutual promises have always been considered sufficient consideration for enforceability.[30] As persons under the age of capacity[31] could not consent,[32] it appears the framer's intended that adults were of the class "ourselves," and all others of the class "Posterity,"[33] to include lives in being, *i.e.* unborn and partially born children.

Taking the approach those unborn and partial born children are present members of "Posterity" answer a number of theoretical problems. *Casey,* 505 U.S. at 860. (O'Connor, 1.) First, it is further development of constitutional theory recognizing there is not just one right, or more precisely life, at stake, but two, the mother's, a member of "ourselves," and her conceived unborn, a present member of "Posterity." Second, it supports the proposition the State cannot force women to terminate pregnancy or engage in eugenics, because her conceived unborn is a person entitled to protection. Third, it sets a standard that termination of a pregnancy occurs as a result of natural birth, or based on necessary medical intervention for the preservation of both lives. Fourth, it assures a woman's right to seek medical intervention to preserve both lives, if possible, without undue state influence. Fifth, it takes the courts,

---

27 2 Farrand, Max, The Constitutional Debates, pp. 152, 163, 177, 193, 196, 209, 565, 582, 590, *65;* 3 Rotunda, op cit., p. 663, note I.

28 E.g., Hobbes, Leviathan (1651); Locke, SECOND TREATISE OF GOVERNMENT (1690); Laqueur, THE-HUMAN RIGHTS READER (1979).

29 Verdross, *Forbidden Treaties In International Law,* 31 AJIL 571 (1937) *Id, Jus Dispositivum & Jus Cogens In International Law,* 60 AJIL 55 (1966).

30 Chitty on Contracts (23rd Ed, 1968) 134; Restatement, Contracts (1st) §77; *Coggs v. Berherd,* 2 Ed.Raym. 909 (1703).

31 "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." 26th Amend, § 2.

32 Chitty on Contracts.

33 2 Stephens Commentaries 342 (1841).

and those responsible for the medical care of both mother and the conceived unborn out of the quagmire of trying to guess when the unborn become "viable" and therefore entitled to protection. With conception, there is no guesswork. Finally, it does justice by respecting the Constitutional guarantee to protect human life.

B. A Conceived unborn is Life Within The Meaning of the 5th Amendment

It would appear that a conceived unborn have all of the characteristics of life:[34] excretion,[35] ingestion,[36] respiration,[37] irritation,[38] and reproduction.[39] A zygote (early conceived unborn) is viable, in contradistinction to the ovum and sperm, which are not.[40] Whether or not it can be ascertained at any point in time that it is human is an absurd proposition; assuming it goes to term it cannot be anything but human. The fact that the zygote is not viable extrauterine does not negate the fact of life. Life exists in an environment. No one would seriously consider sending an astronaut tied to an "umbilical cord" on a space walk to test whether or not the astronaut were life by cutting the umbilical cord to see if the astronaut could survive; such a proposition is absurd. Moreover, even a conceived unborn securely within the womb will die if there is an abruption of the placenta.[41] Finally, the courts can judicially notice the advance of science in making possible test tube pregnancies, and transfers from one womb to another, all suggesting the presence of life from conception.

The terms "ensoulment", "psych", "free will", and when they manifest themselves, are not relevant. We are concerned with Posterity, and it cannot be denied, in light of the arguments heretofore

---

34 Biology: Observation & Concept by Case & Steirs (1971), p. 110.

35 Id, pp. 122, 141, 143, 149-150.

36 Id, pp. 70, 80.

37 Id, pp. 8, 51, 64, 77.

38 Id, irritation, pp. 267, 329, 330.

39 Id, reproduction, pp. 122, 163-165, 298-299, 327, 329.

40 Id, pp. 324-327.

41 Jacobs, Warren M. and Jacobs Mark A., MDs, Obstetrics and Gynecology, Family Health & Medical Guide (1979), page 93.

made, that Posterity includes all future generations, with the conceived having a presently protect able interest. 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill, supra*, 205 P. 917 (1922); 17 Halsbury's Laws of England (1st ed, 1911) Infants §§ 132, 135.

C. The Conceived Unborn are entitled to protection

The Constitution Provides, in relevant part:

> "No person shall be, ... deprived of life ... without due process of law."

U.S. Constitution, 5th Amendment. Neither a State nor the federal government may utilize money to take life without due process of law. *E.g., Flash v. Cohen*, 392 U.S. 83 (1968). Assuming, arguendo, that the conceived unborn is a life, it has the right to representation, 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill, supra*, 205 P. 917 (1922); 17 Halsbury's Laws of England, Infants §§ 132, 135 (1st ed, 1911), to be heard on the question as to whether its life should be terminated. *Generally, Mullane v. Central Hanover B&T*, 339 U.S. 706 (1950); *Furman v. Georgia*, 408 U.S. 238 (1972); and it *progeny*; *Cruikshank, supra*, 92 U.S. (2 Otto), at 549.

Given a state's obligation to protect it citizens at home, and to ensure life is not taken without due process of law, neither Illinois nor the federal government have a legitimate interest in denying citizens the right to defend and protect the conceived unborn. Their citizens, and the citizen's of every state, have an interest in insuring that there exist safeguards to ensure that abortion does not become a tool for genocide. E.g., International Convention on the Prevention and Punishment of the Crime of Genocide, Congressional Digest, December 1984; U.S. Const., Art. VI, cl 2 (treaties).[42]

---

42 This is not to say that a State may say a woman does not have any right to privacy and may never have an abortion. Clearly, the Constitution implicitly recognizes the right to privacy. U.S. Const., 2d (Quartering of soldiers), and 4th (search and seizure) Amendments; *Katz v. United States*, 389 U.S. 347 (1967), and its *progeny*. But it is equally clear that a person cannot use the right of privacy and the right to do with one's body what he or she wishes to do with their body if the conduct amounts, under state law, to a crime. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Nonetheless, every person has the right to self-defense.

III.

PETITIONERS HAVE A RIGHT TO USE REASONABLE FORCE TO PROTECT HUMAN LIFE; THE RECORD DOES NOT SUPPORT A CLAIM OF UNREASONABLE FORCE BY PETITIONERS

A. The right to defend others, generally

"Ordinarily, -- if not always," says Bishop, "one may do in another's defense whatever the other might in the circumstances do for himself. Bishop, Criminal Law § 877 (9th Ed., 1923). This special privilege appears to have had its roots in the law of property, but in the course of time outgrew the property analogy and came to be regarded as a "mutual and reciprocal defense." 3 Blackstone's Commentaries 3. In recent years, classifications as to who could defend whom have eroded to become a generalized privilege of using force for the defense of others to include even the defense of strangers. Salmond, Torts 375 (11th Ed 1953.) However, the privilege to use force in defense of another is subject to the same general limitations and restrictions as the privilege to use force in self-defense. Hence deadly force may not be used to save another from non-deadly force, and even non-deadly force must not be obviously in excess of what is needed for the purpose. Id, at Comment b; Boyce & Perkins, Criminal Law and Procedure 819-20 (West, 7th ed 1989).[43]

B. First Amendment Right to Speech

Foster, Crown Law 273-277 (1762); Restatement (2nd) Torts §§ 63, 64, & 65; *Brown v. United States*, 256 U.S. 335 (1921). Thus it would appear where the woman's life or health is endangered, termination of the pregnancy would be justified. But even here, there appears to be less drastic alternative means than outright abortion. This court can judicially notice, or remand for consideration, the fact that modern advances have made possible womb-to-womb transfers to embryos. On the same basis, this court may notice or remand the fact that there are many persons unable to conceive who would welcome such transfers.

43 It is regrettable that anyone one was hurt. No one condones intentional abuse. However, it is inevitable that in defending the defenseless, on occasion someone will get hurt. On the record below, it does not appear that Petitioners set out intentionally to cause physical harm, but rather the result of two sides refusing to give an inch.

"Protection of politically controversial speech is at the court of the First Amendment, and no one disputes that the defendants' speech labeling abortion as murder, and urging the clinics to get out of the abortion business, and urging clinic patients not to seek abortions if fully protected by the First Amendment. *See, e.g., Bray v. Alexandria Women's Health Clinic*, 506 US. 263 (1993). It is equally clear, however, that the First Amendment does not protect violent conduct, *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993), nor does it protect threats (Cites omitted), nor language used to carry out **illegal conduct** (Cites omitted.)" Opinion below, part III.A.

The opinion below describes a few sporadic incidents when some people were hurt as a result of unintended injuries resulting in trying to prevent injury to the conceived unborn. Here, Petitioners used reasonable force in the defense of the conceived unborn. Neither motive nor act amount to a wrongdoing. Their activity was justifiable.

C. THE RICO CLAIM

The opinion below describes a few sporadic incidents when some people were hurt as a result of unintended injuries resulting in trying to prevent injury to the conceived unborn. It is really the pot calling the kettle black. As it has been shown above that the conceived unborn are entitled to protection, neither NOW, nor any of the respondents can show a prosecutable interest to be protected.

D. THE HOBBS ACT.

While extortion may be a crime under the Hobbs Act, 18 U.S.C., § 1951), and various state laws, it still requires an illicit motive and a wrongful act. Here, Petitioners used reasonable force in the defense of the conceived unborn. Neither motive nor act amount to a wrongdoing.

Based on the foregoing considerations, and in light of the record below, Women do not have a fundamental right to abortion, and therefore no rights of Respondent have been violated. On the contrary, the life of a conceived unborn being a constitutional person is entitled to protection, and on the record below, it cannot be said that the conduct of the Petitioners was unreasonable but the result of accidents that inevitable occur when there is a confronta-

tion.

CONCLUSION

Based upon the foregoing, this court should overrule *Roe v. Wade*, 410 U.S. 113 (1973) prospectively, reverse the decision of the Fourth Circuit at 914 F.2d 583 as to the rights of women to have abortions, and remand for further proceedings not inconsistent with this Court's opinion.

Dated: July 1, 2002

Respectfully submitted,

JAMES JOSEPH LYNCH, JR.
Attorney at Law (Cal. SBN 85805)
2740 Howe Ave.
Sacramento, CA 95812-0336
(916) 921-1988
jjlynch@cwnet.com

Counsel for *Amicus Curiæ*

EXCERPTS FROM
2 Farrand, Max, The Constitutional Debates*

[129]

COMMITTEE OF DETAIL, I

***

[Proceedings of the Convention, June 19 -- July 23.]

[152]

COMMITTEE OF DETAIL, IV

*****

VI

We the People of (*and*) the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

1.

*****

[163]

COMMITTEE OF DETAIL, IX

*****

---

* Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitalization is exactly as found in Farrand's that faithfully follows the manuscript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says, "Found among the Wilson Papers and in Wilson's handwriting. Portions in parentheses represent parts crossed out. Italics represent later insertions."

IX

We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

1.

*****

[177]

Monday MADISON August 6

MADISON

Monday August 6th. In Convention

<Mr. John Francis Mercer from Maryland took his seat.>

Mr. Rutlidge <delivered in> the Report of the Committee of detail as follows: < a printed copy being at the same time furnished to each member.>

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

****

[193]

TUESDAY, AUGUST 7, 1787.

JOURNAL

TUESDAY AUGUST 7, 1787.

[To refer the report to a Committee of the whole Ayes -- 5; noes -- 4.

Delaware being represented during the Debate a question was again taken on ye Committee of ye whole Ayes --- 3; noes --- 6.]

On the question to agree to the Preamble to the constitution as reported from the committee to whom were referred the Proceedings of the Convention -- it was passed unan: in the affirmative [Ayes -- 10; noes --- 0.]

*****

[196]

Tuesday MADISON August 7

MADISON

Teusday August 7th. In Convention

The Report of the Committee <of detail being> taken up ...

******

The <preamble> of the Report was agreed to nem. con. So were Art: I & II.

[209]

Tuesday MADISON August 7

MCHENRY

Augt. 7.

*****

The preamble or caption and the 1. and 2. article passed without debate, ...

*****

[565]

COMMITTEE OF STYLE

Proceedings of Convention Referred to the Committee

of Style and Arrangement.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

ARTICLE I.

*****

[590]

COMMITTEE OF STYLE

Report of Committee of Style

WE, the People of the United States, in order to form

a more perfect union, to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

[604]

THURSDAY, SEPTEMBER 13, 1787.

JOURNAL

THURSDAY SEPTEMBER 13, 1787.

****

Resolved that the preceding Constitution be laid before the United States in Congress assembled, and that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification.

***

*****

[604]

***

[To postpoine the report respecting the 22nd and 23rd 9; noes --- 1.] Ayes ---

*****

To strike out the word "to" before establish justice 8; bites --- 2,] Ayes ---

[641]

MONDAY, SEPTEMBER 17, 1787.

JOURNAL

MONDAY SEPTEMBER 17, 1787.

DETAIL OF AYES AND NOES

	The Constitution Unanimously agreed to.	To deliver over the Journal and papers to the President.	
	[567]	[568]	[569]
New Hampshire	aye	aye	aye
Massachusetts	aye	aye	aye
Rhode Island	aye	aye	aye
Connecticut	aye	aye	aye
New York	aye	aye	aye
New Jersey	aye	aye	aye
Pennsylvania	aye	aye	aye
Delaware	aye	aye	aye
Maryland	aye	aye	no
Virginia	aye	aye	aye
North Carolina	aye	aye	aye
South Carolina	aye	dd	aye
Georgia	aye	aye	aye

MADISON

MONDAY SEPR. 17. 1787. IN CONVENTION

The engrossed Constitution being read, ...

Docr. Franklin rose with a speech in hand ....

*****

[643]

... --- He then moved that the Constitution be signed ...

[644]

*****

On the question to agree to the Constitution enrolled in order to be signed. It was agreed to by all the States answering ay.

*****

[649]

MCHENRY

MONDAY SEPR. 1787.

Read the engrossed Constitution. Altered the representation in the house of representatives.

*****

[651]

THE CONSTITUTION
OF THE UNITED STATES

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****